United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

SEP 21 1976

76-1269

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

B
P/S

CASE NO. 76-1269

UNITED STATES OF AMERICA,

APPELLEE

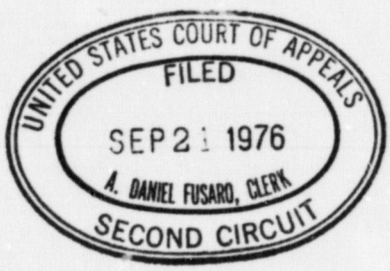
VERSUS

HERBERT SPERLING,

APPELLANT

Appeal from Order of United States District Court for the Southern District of New York on Reconsideration of Sentencing on Count 1 (Conspiracy)

REPLY BRIEF FOR APPELLANT



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APPELLANT'S REPLY BRIEF

Comes now the appellant Herbert Sperling in proper person and in reply to the government's brief shows the Court:

1.

ISSUE INVOLVED IS THE SENTENCE, NOT THE CONVICTION

The government erroneously states at page 3 et seq of its brief that Sperling is attacking his "conviction" on Count 1. Actually, Sperling in his main brief went to great pains to show that on this appeal, he is raising only the issue of multiple "punishment", as contrasted to prosecution or conviction (Br. 10); that a continuing course of criminal conduct may not be "punished" cumulatively (Br. 11); that Congress did not intend, and the double jeopardy clause of the Fifth Amendment does not permit, cumulative "punishment" for related Sec. 846 and 848 violations where the former is a lesser included offense and necessary element of the latter, as in the instant case (Br. 7, 12-13). At risk of being overly repetitious and tedious, Sperling reiterated at page 25 of his main brief:

> "Sperling assumes arguendo that neither Wharton's Rule nor the double jeopardy clause of the Fifth Amendment prohibits prosecution at the same or separate trials for related violations of Sec. 846 and 848. He contends only that the double jeopardy clause prohibits cumulative punishment where the Sec. 846 conspiracy is shown by the indictment, evidence and charge to the jury to be a necessary element and lesser included offense of the Sec. 848 enterprise, as in the instant case."

Government counsel's misstatement of the issue raised on this appeal is not without guile, as counsel of course knows that Sperling would have a greater burden in showing the illegality of his conviction on Count 1 than merely showing the illegality of cumulative punishment on that Count.

This Court frequently has recog ized the distinction between vacating a conviction and merely vacating a sentence. In United States v. Stewart, 523 F. 2d 1263, 1264, this Court said:

> ". . . In order to preserve for appeal convictions for violations of subsections (a) and (d) of 18 U.S.C. Sec. 2113, this Court has deemed it proper for the district court to enter simultaneous judgments of convictions under both of those subsections, Gorman v. United States, 456 F. 2d 1258 (2d Cir. 1972). We have previously indicated, however, that simultaneous sentences, whether concurrent or consecutive, under subsections (a) and (d) are improper. United States v. Stewart, 513 F. 2d 957 (2d Cir. 1975); United States v. Pravato, 505 F. 2d 703 (2d Cir. 1974); Gorman v. United States, supra."

2.

SCOPE OF JURISDICTION ON RESENTENCING

The government at pages 4-5 of its brief erroneously states that this Court's remand was "explicitly" limited to "reconsideration of the length of sentence on Count One," and cites United States v. Hoffa, 436 F. 2d 1243, 1248 (7th Cir. 1970) in support of its argument that Judge Pollack on remand "lacked jurisdiction to hear the arguments raised by Sperling at the time of his resentencing." The government's statement that this Court "explicitly limited" Judge Pollack's jurisdiction on remand is factually incorrect, as the wording of the mandate itself will show. At any rate the issues raised by Sperling on remand, and argued on this appeal, are directly related to the "sentence" on Count 1, and to that alone, as Sperling contends first that he should have no sentence at all on Count 1, and alternatively contends

that his sentence should not exceed five years, which certainly relates to length of sentence. Hoffa is not in point as the Supreme Court in that case did, in fact, expressly and categorically limit proceedings on remand to the electronic eavesdropping issue, Hoffa et al v. United States, 387 U.S. 231, at pages 233-234, notwithstanding which limitation the defendants on remand sought to reargue a number of issues that had been decided against them on the merits, on the first and second appeals. In this context, the Seventh Circuit declined to reconsider the issues previously ruled upon, relying on the law of the case, 436 F. 2d at 1248, and holding that the Supreme Court remand did not open to reconsideration various contentions of the defendants in regard to the merits of their convictions. Sperling is not asking this Court to reconsider any issue previously decided against him on the merits and is not asking the Court to consider the merits of his conviction, but only the cumulative sentence on Count 1, which issue has not previously been ruled upon.

United States v. Kane, 450 F. 2d 77,83 (5th Cir. 1971), cited at page 5 of the government's brief on this same point, is, like the Hoffa case, wholly inapposite.

3.

THE "DELIBERATE BYPASS" ISSUE

The government at pages 5-7 of its brief erroneously states that Sperling's counsel contended in pretrial motions that the Count 1 conspiracy was a lesser included offense of the Count 2 enterprise, and that this issue was "deliberately bypassed by Sperling's experienced counsel on the direct appeal." The trial and pretrial record will be searched in vain for any motion by Sperling's counsel, oral or written, raising the lesser included offense

issue in the context of multiple punishment. It is true that Sperling's counsel prior to trial raised a Wharton's Rule issue, unsuccessfully contending:

> "4. Counts One and Two violate Wharton's Rule and where said Rule is applicable the conspiracy count should be dismissed."

(See Sperling Appendix, page 47, on original direct appeal). However the issue of cumulative punishment was not raised in any trial or pretrial motion, as it would have been premature to do so. There was no basis for the lesser inclued offense contention until the evidence was in, the jury was charged, and Count 1 was amended so as to make it coterminous in time to Count 2. On appeal the cumulative punishment issue was not raised or decided, as Sperling's counsel contended on that appeal that Sec. 848 was unconstitutional and that the evidence was insufficient to support conviction on the Sec. 848 enterprise. It would have been inconsistent and inappropriate for Sperling's counsel to further contend that the 846 conspiracy was included in the 848 enterprise, in view of counsel's good faith contention that the Sec. 848 conviction was constitutionally invalid and not supported by sufficient evidence. Sperling's present contention that the 846 conspiracy was included in the 848 enterprise was not ripe for presentation until this Court on direct appeal held that the conviction and sentence on Count 2 were valid, and the Supreme Court denied certiorari.

At any rate the issue of cumulative sentences in violation of the double jeopardy clause of the Fifth Amendment may be raised at any time, United States v. Mack, 494 F. 2d 1204, 1207 (9th Cir. 1974; Prince v. United States, 352 U.S. 322 (1957), either under Rule 35, Fed. Rules of Crim. Proc., or 28 U.S.C. 2255; hence this Court in the interest of judicial economy, if for no other reason, should decide the issue on the merits at this time, especially in view of the fact that Judge Pollack, notwithstanding the government's

'ections, considered and ruled on each issue raised in the resentencing proceeding, on the merits. If necessary this Court could and should treat Sperling's motion :n resentencing as a petition under Rule 35 or 28 U.S.C. 2255 to vacate an illegal sentence.

It is further submitted that since Sperling's present attack on the Count 1 sentence is based on the district court's lack of jurisdiction to impose the same, he is asserting a Fifth Amendment right which cannot be waived, which he cannot be deemed to have waived by his failure to previously raise the question. If the sentence was not proper the Court had no authority or jurisdiction to impose it, and Sperling could not by any act of omission or comission confer jurisdiction. If the government's reasoning were followed to its logical conclusion, a defendant sentenced to a ten year term in a case where the statute specified a five year maximum would never be able to attack his illegal sentence, if he had appealed from his original judgment and conviction and had not raised the question on such appeal. Surely the government would not endorse such a ridiculous result. The same principal is involved in the instant case, hence the issue was properly raised at time of resentencing.

Judge Pollack conducted no evidentiary hearing and made no finding of fact that Sperling deliberately bypassed his direct appeal on the cumulative punishment issue. It has been held that even where an appellant outright dismisses a direct appeal, abandonment or waiver of the issues raised may not be assumed, but facts supporting such an assumption must be developed on the record. In McKnight v. United States, 507 F. 2d 1037, 1038 (5th Cir. 1975) the Court said:

> "We will not assume abandonment of the right to appeal from a criminal conviction unless facts clearly supporting such an assumption are developed on

the record ...is v. United States, 5 Cir., 1974, 503 F. 2d 4..., 458; Chapman v. United States, 5 Cir., 1972, 469 F. 2d 634, 637; McKinney v. United States, 5 Cir., 1968, 403 F. 2d 57, 59."

Even in the case of a state prisoner applying for federal habeas corpus relief, where the prisoner through counsel had renounced his right to appeal the state conviction, the Fifth Circuit held that an evidentiary hearing was required on the bypass question before relief could be denied on that ground. Barnes v. Estelle, 518 F. 2d 182, 184 (5thCir. 1975). Effective waiver of a right or privilege can be found only where there is an "intentional" relinquishment or abandonment. Johnson v. Zerbst, 304 U.S. 458 (1938).

At page 5 of its brief the government cites United States v. West, 494 F. 2d 1314, 1315 (2nd Cir. 1974) as authority for the proposition that Sperling's present contentions should be rejected because the arguments now advanced "were available to him on the direct appeal but were not presented at that time." This Court in West denied Section 2255 relief respecting an eavesdropping issue, holding that three experienced defense counsel could have raised the issue at trial or on direct appeal but did not do so, and upon a further finding that the eavesdropping testimony played a "minor role" in the case. Id. at 1315. ThisCourt further held that prior defense counsel had determined in their discretion that there was "scant purpose to raise objection" to the eavesdropping issue testimony, and thus "deliberately bypassed" the various review procedures provided. Id. at 1315.

However in a later case, Natarelli v. United States, 516 F. 2d 149 (2nd Cir. 1975), which is on all fours with the instant case, this Court distinguished West, and held that Natarelli's failure to raise on direct appeal

the issue of whether the district court had improperly imposed separate sentences on each count of a conspiracy indictment, where the proof showed only a single conspiracy, did not preclude his raising such issue on a motion to vacate sentence. This Court further held that since it was the sentencing itself that was illegal, the error was not cured by the existence of concurrent sentences, and the proper remedy was to remand the case for resentencing, even though vacation of the concurrent five-year sentence on one of the counts would leave Natarelli with a twenty year sentence on the other count. In footnote 4 of the Natarelli decision this Court, relying on Gorman v. United States, 456 F. 2d 1258 (2nd Cir. 1972) as authority for granting Section 2255 relief, went on to say:

> ". . . That (the Gorman case) was a Sec. 2255 proceeding attacking the imposition of pyramided sentences for a multiple-count bank robbery conviction in violation of Prince v. United States, 352 U.S. 322 (1957). The conviction had been affirmed on direct appeal without challenge to the sentencing, United States v. Gorman, 355 F. 2d 151 (2nd Cir. 1965), cert. denied, 384 U.S. 1024 (1966); the Prince claim was first raised in the Section 2255 proceeding. This court, reciting the case's history, considered Gorman's Prince claim on its merits without referring to the effect of his failure to raise it on direct appeal.
>
> "On its face, Gorman seems difficult to reconcile with the familiar admonition that Section 2255 may not be used to challenge errors not raised on direct appeal, Sunal v. Large, 332 U.S. 174 (1947); United

States v. West, 494 F. 2d 1314 (2d Cir. 1974); United States v. Gordon, 433 F. 2d 313 (2nd Cir. 1970) (per curiam), unless there was an error of significant constitutional dimension, Kaufman v. United States, 394 U.S. 217, 233 (1969), a trial defect not correctible on appeal, or a failure to appeal excusable for exceptional circumstances, United States v. Sobell, 314 F. 2d 314, 323 (2nd Cir.), cert. denied 374 U.S. 857 (1963). None of these circumstances apply here, nor did they in Gorman. That entire line of authority, however, may fairly be distinguished by virtue of the fact that here, as in Gorman, the claim goes to the illegality of the sentence itself, and not to trial errors tainting the underlying conviction. Thus, whether or not a Section 2255 motion is available to Natarelli here, we could clearly permit him to proceed by considering the motion as a motion to correct an illegal sentence under Rule 35, Fed. R. Crim. P. ('The court may correct an illegal sentence at any time . . .'); Heflin v. United States, 358 U.S. 415, 418 (1959). That was the view of this court in a similar situation in United States v. Coke, 404 F. 2d 836, 847-848 (2nd Cir. 1968) (en banc); we adopt it here, and hold that it was error for the district court to deny Natarelli's motion because of his failure to raise the point on direct appeal."
(Id. at 152, note 4.)

At page 6 of its brief the government cites Castellana v. United States, 378 F. 2d 231, 233 (2nd Cir. 1967), on the "deliberate bypass"

issue. Castellana is not in point as the Court denied Section 2255 relief in that case because the questions raised had been litigated and ruled on, on the merits, on the original direct appeal. Additional Second Circuit cases cited by the government at page 6 of its brief on the bypass issue are United States v. Williams (correct style of case is Williams v. United States), 463 F. 2d 1183, 1184 (2nd Cir. 1972), cert. denied 409 U.S. 967; Zdanuck v. United States, 448 F. 2d 339, 341 (2nd Cir. 1971), cert. denied 405 U.S. 1043; and United States v. Gordon, 433 F. 2d 313, 314 (2d Cir. 1970). These cases not only are distinguishable on their facts but are in conflict with the later decision in Natarelli, supra, insofar as the government cites them for authority to find a deliberate bypass of appeal by Sperling on the double jeopardy issue of cumulative sentencing. The government's reliance at page 6 of its brief on Kaufman v. United States, supra, is totally misplaced as Kaufman is authority for a conclusion opposite to that contended for by the government, as Kaufman holds that an error of significant constitutional magnitude may be the subject of a collateral attack even though it was not raised on direct appeal. 394 U.S. 217, at page 233.

4.

CONCURRENT SENTENCE DOCTRINE

In the court below, neither government counsel nor Judge Pollack mentioned the concurrent sentence doctrine as ground for denying relief; however the government now, at page 5 of its brief, relies on that doctrine, for the first time. In doing so, the government necessarily but erroneously is representing to this Court that the sentence on Count 1 is wholly concurrent with and subsumed by the sentence on Count 2. However the maximum

$50,000.00 committed fine on Count 1 is not concurrent with, but is in addition to, the maximum $100,000.00 committed fine on Count 2 (App. 111, 80). Therefore the sentences in question are not concurrent.

In United States v. Mori, 444 F. 2d 240 (5th Cir. 1971), a case directly in point, the court rejected the government's contention that the defendant was not prejudiced by concurrent sentences on merged counts, as the cumulative fines on both counts exceeded the maximum fine allowable on either count, hence the error was not cured by the existence of concurrent sentences.

The government at page 5 of its brief cites four decisions of this Court which the government construes as supporting the concurrent sentence doctrine. In one of those cases, United States v. Cioffi, 487 F. 2d 492, (2nd Cir. 1973) this Court's reference to that doctrine was hypothetical only and the doctrine was conditionally or tentatively relied on "if the concurrent sentence doctrine retains some vitality after Benton v. Maryland, 395 U.S. 784, 789-792", Id. at 498. Sperling could cite perhaps fifty or more recent federal appellate decisions which have not followed the concurrent sentence doctrine, the viability of which was drawn in question by Benton v. Maryland. Some typical cases rejecting the concurrent doctrine are: Rose v. United States, 448 F. 2d 389 (5th Cir. 1971); United States v. White, 440 F. 2d 978 (5th Cir. 1971); United States v. Abercrombie, 480 F. 2d 961 (5th Cir. 1973); Natarelli v. United States, supra, 516 F. 2d 149 (2nd Cir. 1975), supra. No case has been found adhering to the concurrent sentence doctrine where the committed fines on the sentences at issue were cumulative, as in the instant case, especially where the aggregated fines exceeded the maximum allowable on either count.

The fact that the prison sentence on Count 2 is life without parole does not mean that adverse collateral consequences may not flow from the concurrent 30 year prison sentence on Count 1, as there is always the possibility of presidential commutation of the life sentence, but Sperling's application for such commutation might be adversely affected by the 30 year sentence on Count 1. There is also the possibility that Congress will extend the parole privilege to Sec. 848 sentences; indeed it may already have done so in the recently enacted Act revising and liberalizing parole, which has not yet been judicially construed as to whether it extends parole to Sec. 848 offenders. In such event Sperling's chances for parole would be jeopardized by the concurrent 30 year prison sentence on Count 1. In United States v. Branic, 495 F. 2d 1066, 1088 (D.C.Cir. 1974), the defendant received a life sentence for murder and robbery, and a lesser concurrent sentence for assault. The Court of Appeals, rejecting the concurrent sentence doctrine, ordered the assault sentence vacated, notwithstanding the fact that it was totally subsumed in the valid life sentence.

This Court in effect has already rejected the concurrent sentence doctrine in the instant case by remanding Count 1 for resentencing. If thisCourt on the original direct appeal had considered the concurrent sentence doctrine applicable, it would not have remanded Count 1 in the first place.

5.

CONGRESSIONAL INTENT

At page 8 of its brief the government relies, incredibly, on Gore v. United States, 357 U.S. 386, 390, decided in 1958, to show congressional intent respecting the Controlled Substances Act of 1970. The government

does not explain how the 1958 Supreme Court knew what the 1970 Congress intended in carrying out its declared purpose to completely revamp and revise the entire structure of criminal penalties for narcotics violations, as shown in U.S. Code Cong. and Adm. News, 91st Congress, Vol. 3, page 4570. The Gore decision dealt with three penal narcotics laws, now repealed, having "different origins both in time and design . . . three different enactments, each relating to a separate way of closing in on illicit distribution of narcotics, passed at three different periods." Gore v. United States, supra. As stated in Sperling's main brief herein at pages 13-14, each of the three statutes in Gore required a distinct element not present in the other two, and this met the double jeopardy test of Blockburger v. United States, 284 U.S. 229 (1932). By contrast Sections 846 and 848 of the Controlled Substances Act of 1970 are in a single enactment, in the same subchapter, and there is no element of a Sec. 846 conspiracy that is not included in the larger Sec. 848 "series" of offenses which require concerted action, at least not under the facts and theory of prosecution of the instant case.

The government has not refuted or even mentioned in its brief the additional congressional intent considerations raised in Sperling's main brief at pages 12-15, such as the ultimate penalty of life without parole for violation of Sec. 848; the fact that Sec. 846 equates "attempt" with "conspiracy" to violate narcotics laws; the rule of lenity.

The government at page 8 of its brief professes to derive comfort from a statement in the 1970 U.S. Code Cong. and Adm. News, pp. 4576, 4651, that Sec. 848 provides "a means for keeping those guilty out of circulation;" however the government's resulting conclusion, that Congress intended Sec.

846 and 848 violations to be punished cumulatively, is a non sequitur, in view of the life without parole penalty of Sec. 848. The government also pretends to be comforted by the fact that the legislative history of Sec. 848 shows it is a "new and distinct offense with all its elements triable in Court" (Govt. Br. 8); but this could be said of just about any penal statute Congress ever enacted, including 18 U.S.C. 2113(d) of the Bank Robbery Act, which provides a penalty of 25 years for the offense of putting a life in jeopardy during a bank robbery, however such legislative history and congressional intent to create this "new and distinct crime" did not prevent the Supreme Court from holding that simple bank robbery, defined by 18 U.S.C. 2113(a), is a lesser included offense of the new and distinct offense of putting a life in jeopardy while robbing a bank. Prince v. United States, 352 U.S. 322 (1957). The mere fact that Sec. 848 is a new and distinct offense has no bearing at all on the question of whether Congress intended cumulative punishment for a lesser offense included therein.

6.

DOUBLE JEOPARDY VERSUS WHARTON'S RULE

In a determined effort to misinterpret and translate Sperling's double jeopardy contention, which is impregnable, into a Wharton's Rule issue, which is somewhat more vulnerable, government counsel studiously avoids discussing the double jeopardy issue and double jeopardy cases cited at pages 10-12, 13, 15 of Sperling's main brief, but quixotically attacks the non-issue of Wharton' Rule, wielding the weapons and irrelevant rhetoric of Wharton's Rule cases such as Ianelli v. United States, 420 U.S. 770, 777 (1975); United States v. Bommarito, 524 F. 2d 140, 144 (2nd Cir.

1975); and United States v. Becker, 461 F. 2d 230 (2nd Cir. 1972) (Govt. Br. 7-8). Those cases are inapplicable because they are Wharton's Rule cases, not double jeopardy cases, and for additional reasons stated at pages 15-24, 28-30 of Sperling's main brief, including fact that they are factually distinguishable. These contentions are not refuted or even mentioned in the government's brief.

7.

THE NUMBER OF PARTICIPANTS INVOLVED IN COUNT 1

Continuing to exploit the non-issue of Wharton's Rule which relates to prosecution and conviction, as contrasted to cumulative sentencing, the government at page 7 of its brief parrots the irrelevant argument that the Count 1 conspiracy "involves" more participants than the Count 2 enterprise "requires". This argument relates of course to the "Third Party Exception" of Wharton's Rule, permitting prosecution for both a conspiracy and the substantive offense where the former involves more participants than the latter requires. Sperling reiterates, he is not relying on Wharton's Rule and is not contending, on this appeal, that he could not legally be "prosecuted" or even "convicted" of both the 846 conspiracy and the 848 enterprise, but only that he cannot, legally, be cumulatively "punished" without violating the double jeopardy clause of the Fifth Amendment. As noted previously, the double jeopardy issue of whether the 846 conspiracy was a lesser included offense of the 848 enterprise was not capable of determination until the evidence was in, the jury was charged, and Count 1 was amended so as to make it coterminous in time to Count 2; whereas, the Wharton's Rule issue of whether prosecution and conviction on both counts

was permissible was capable of determination from examination of the indictment and statutes prior to trial.

The crucial and determining factor of the double jeopardy issue is whether the Count 1 conspiracy as actually tried to the jury in this particular case required any proof, or had any element, that was not included in "larger" Count 2. It is immaterial that a different or larger group was involved in Count 1, in view of Judge Pollack's charge to the jury that as to Sperling individually and his individual guilt (which is all we are concerned with here) the government relied on the agreement he had with the same six co-conspirators for conviction on both counts, which is clearly demonstrated by Judge Pollack's marshalling of the evidence during his charge to the jury, as follows:

> "I will now deal with the evidence produced by the government which it contends points to the guilt of each defendant, first in summary form by counts,and then by defendants, one by one." (R. 4150).
>
> "First in summary. The government contends (as to Count 1) that the evidence shows a single conspiracy among all the defendants to purchase, to process and resell narcotic drugs . . . The government contends that Sperling commanded the services of Norman Goldstein, Edward Schworak, Louis Mileto, Cecile Sperling, Jack Spada and Joseph Conforti." (R. 4141). (The Court here is speaking of Count 1).

"Now as to Count Two, which is against Herbert Sperling as the defendant charged . . . The government contends that Sperling occupied a position of organizer, supervisor and manager with respect to six persons in connection with his narcotics business, Edward Schworak, Jack Spada, Norman Goldstein, also known as Sonny Gold, Joseph Conforti, Louis Mileto and Cecile Sperling." (R. 4153).

The fact that Sec. 846 reaches the footsoldiers of the conspiracy as well as the kingpin, whereas Sec. 848 reaches only the latter, is irrelevant in assessing Sperling's individual guilt, as the essence of any conspiracy is the agreement, and the evidence in this case, as well as the entire theory of the prosecution, was that Sperling's individual participation in the agreement and concerted action of both Count 1 and Count 2 was as organizer, manager, and the person who commanded the services of the other co-conspirators. This is conclusively shown not only by Judge Pollack's marshalling of the evidence as quoted above but also by his further charge to the jury that the scope of each defendant's agreement must be determined individually (R.4129); that each defendant is entitled to individual consideration (R. 4132), including his status as partner or supervisor (R. 4132); and it is immaterial that the parties are not always the same (R. 4133-4134).

8.

LESSER INCLUDED OFFENSE

The government's position as to whether or not the Sec. 846 conspiracy is a lesser included offense of the 848 enterprise is ambiguous, as if government counsel were seeing through a glass darkly. In pussy footing around this crucial issue without firmly committing itself to any particular

rationale or position, the government contents itself to relating, at page 7 of its brief, what Judge Pollack ruled, without endorsing the rationale of such ruling and without rejecting it either. Judge Pollack's ruling was itself ambiguous as to whether or not the 846 conspiracy was a lesser included offense of the 848 enterprise, as he rejected Sperling's contention in this regard by referring to the Third Party Exception of Wharton's Rule, which was not applicable to this double jeopardy issue. The government also recites the holding of United States v. Jeffers, 532 F. 2d 1101 (7th Cir. 1976) at page 7 of its brief, which begins by holding that a Sec. 846 conspiracy is a lesser included offense of an 848 enterprise -- a holding that is no doubt less than palatable to the government in the instant case -- but ends with the inconsistent result that cumulative punishment is permissible upon conviction of the lesser and greater offenses. The government would of course like to take advantage of the common result reached by both Judge Pollack and the Jeffers court without being fully bound to the rationale of either, just as, the Jeffers court relied on the Supreme Court's reconciling of Ianelli v. United States, supra, with Blockburger v. United States, supra, but rejected the basis and rationale by which the Supreme Court itself reconciled those two cases, as discussed in Sperling's main brief at pages 18-24.

It is respectfully submitted that the government should come to grips with the maze of contradictions and inconsistent rationales in and between Judge Pollack's memorandum opinion and the Jeffers Court decision, as well as the distinction the government thus far has refused to recognize or mention between the double jeopardy sentencing issue and the Wharton's Rule prosecution issue. This distinction was clea rly recognized by the Supreme Court in Ianelli, 43 L. Ed. 2d at p. 625, 628, n. 18, but apparently is not discernible to government counsel, Judge Pollack or the Jeffers court.

The government's attempt to stand on the shifting rationales of Jeffers, Ianelli, Judge Pollack's memorandum opinion, and the irrelevant third party exception of Wharton's Rule is like trying to stand in a bushel of eels.

9.

INDICTMENT, EVIDENCE AND CHARGE TO JURY

At pages [illegible] of its brief the government attempts to shrug off Sperling's "tedious" analysis of the indictment, evidence and charge to the jury, but offers no counter analysis, tedious or otherwise, to detract from the ineluctible conclusion that the 846 conspiracy was included in the 848 enterprise under the facts of this particular case. The government has no comment on Judge Pollack's precise and tedious marshalling of the evidence, showing that Sperling was connected to the Count 1 conspiracy by commanding the same six co-conspirators that he managed in the Count 2 enterprise during the same time span. The government would like to ignore all the tedious realities and travel instead on abstract principles of law that are not adjusted to the particular facts, realities, and theory of prosecution of the instant case.

Sperling regrets the necessity of lengthening his briefs in this case by repeated references to the record. Sperling is aware of the merits of a short brief, and on this issue the government wins handily. It has been said, brevity is the soul of wit. A concise brief is a desideratum devoutly to be wished. However there is also a lesson in the anecdote where Abraham Lincoln reportedly said, when asked how long a man's legs should be, that they should reach from his body to the ground. The trouble with the government's brief is that it does not reach from the floating body of abstract law it relies on to the solid ground of the record and facts of the instant

case. Government counsel, no doubt aware that when skating on thin ice one's safety lies in speed, manages to flit through more than 4,000 tedious pages of the trial record in one sentence, as if the record were utterly irrelevant, stating that Sperling's "analysis of various considerations, including the indictment, evidence, the charge to the jury . . . is to no avail" (Govt. Br. 7-8).

The government's failure to favor the Court with its own counter analysis of the indictment, evidence and charge to the jury should be viewed as a tacit admission that the facts in the 4,000 page record are to no avail to the government, hence those facts are tedious and tasteless to government counsel and, from the government's point of view, should not be resurrected.

At page 7 of its brief the government cites six appellate decisions from the Second and Sixth Circuits which the government construes as holding that convictions for both conspiracy and violation of Sec. 848 may be sustained. 1/ Sperling has no quarrel with these decisions or with the government's interpretation of them insofar as they are construed merely to permit prosecution and conviction for related 846 conspiracies and 848 enterprises. However Sperling emphatically urges that none of the six cases explicitly approved of cumulative sentencing, as none of the defendants in those cases raised that issue, and none of the six decisions purport to explicitly decide that issue. The Bommarito and Becker decisions

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1/ United States v. Bommarito, 524 F. 2d 140, 2nd Cir. 1975;
United States v. Becker, 461 F. 2d 230 (2nd Cir. 1972), (vacated on other grounds 417 U.S. 903 (1974)
United States v. Papa, 533 F. 2d 815 (2nd Cir. 1976)
United States v. Sisca, 503 F. 2d 1337 (2nd Cir.), cert. denied 419 U.S. 1008 (1974)
United States v. Manfredi, 488 F. 2d 588 (2nd Cir. 1973), cert. denied 417 U.S. 936 (1974)
United States v. Collier, 493 F. 2d 327 (6th Cir. 1974), cert. denied 419 U.S. 831 (1975).

cited by the government deal with the third party exception to Wharton's Rule, as mentioned previously, and are inapplicable to the instant case for that reason, and the additional reasons pointed out at pages 29-30 of Sperling's main brief. As to the Papa case, the government correctly cites an excerpt from Judge Hays' opinion that "prosecution" on related Sec. 846 and 848 offenses is proper, however the issue of cumulative punishment was not raised or decided on the merits in the Papa case. The same may be said for the Sisca and Manfredi cases. As to United States v. Collier, 493 F. 2d 327 (6th Cir. 1974) the Sixth Circuit was concerned only with the constitutionality of Sec. 848; the issue of cumulative punishment for a related conspiracy was not raised or decided. Furthermore, the conspiracy in Collier was drawn under 21 U.S.C. 963, rather than 21 U.S.C. 846 as in the instant case, and Sec. 963 is not a subsection of the same subchapter in which Sec. 848 appears; whereas, Sec. 846 is in the same subchapter with 848, which is significant in view of the dragnet language of Sec. 848 which includes violations of "any" subsection of the subchapter in which 848 appears.

10.

AMENDMENT OF INDICTMENT

Preliminarily, it should be noted that Sperling, on this appeal, is not asserting that the amendment of the indictment was per se reversible error, cognizable in a Section 2255 proceeding or other collateral attack on the judgment on Count 1. Amendment of the indictment, Judge Pollack's charge to the jury on 18 U.S.C. 371 and on the government's "concession", are discussed on this appeal only in the context of Sperling's contention that he should have been sentenced on basis of 18 U.S.C. 371. Sperling's contention that he should thus have been sentenced assumes that the indictment was valid as drawn, and charged a conspiracy under Sec. 371, but that

the indictment if construed as having been amended, and submitted to the jury as amended, became invalid. The record of the government's "concession" and of Judge Pollack's charge thereon is sufficiently ambiguous to be construed either as amending the indictment, or not amending it. If Count 1 is construed as drawn under Sec. 371 as originally drawn,and if notice is taken of the fact that voluminous evidence of the pre-May 1, 1971 conspiracy was not effectively withdrawn from the jury's consideration, and if Sperling is sentenced pursuant to Sec. 371, then there is nothing at all wrong with the indictment. It is only if Count 1 is construed as not being drawn under Sec. 371, and the indictment is construed as having been amended so as to excise the allegations of pre-May 1, 1971 conspiracy, that the indictment becomes invalid.

At pages 10-11 of its brief the government cites United States v. Cirami, 510 F. 2d 69, 73 (2nd Cir. 1975) cert. denied 421 U.S. 964, in support of its argument that Count 1 was not impermissibly amended by excising the old law part of the conspiracy. Ciramd is not in point, and is distinguishable on the facts, as the Ciramd jury never saw the indictment and was not aware that part of it had been stricken, Id. at 74; the trial judge in reading the indictment to the jury merely omitted the parts to be disregarded, Id. at 74; the stricken words were mere surplusage and related to "an issue of no relevance" in the case, hence the defendants could not have been prejudiced in the manner in which they chose to defend, Id. at 73, 74; the necessity of deleting the "useless averment" in Ciramd was occasioned by a bona fide trivial "mistake" of government counsel in drawing the indictment, Id. at 71; no evidence was introduced in support of the deleted and irrelevant useless averment. None of these considerations are present in the instant case, where material allegations of pre-May 1, 1971 conspiratorial conduct were deliberately, rather than mistakenly, included by government counsel in both the original and the superseding indictments, to gain

a tactical advantage which allowed the government to introduce hearsay evidence to the jury which clearly was not admissible, once the "old law" part of the conspiracy was amended out of the indictment.

This Court in its Cirami decision cited with approval, and certainly did not overrule, United States v. Wolfson, 437 F. 2d 862 (2nd Cir. 1970) where Wolfson's conviction was overturned because "substantial evidence was submitted to the jury in support of allegations subsequently withdrawn from the jury's consideration." 510 F. 2d at p. 73. Wolfson is controlling here. The great mass of hearsay evidence and other evidence which the government deviously sneaked in and put before the jury in the instant case, under the guise of proving an old law conspiracy which government counsel alone knew would be withdrawn just before the jury was charged, is adverted to at page 35A et seq of Sperling's main brief herein, and is set forth in detail at pp. 57-61 of the separate appendix to said brief. Examination and analysis of the voluminous evidence the jury heard respecting the pre-May 1, 1971 old law conspiracy will demonstrate that the instant case is controlled by Wolfson rather than by Cirami and the other cases cited at pages 10-11 of the government's brief relative to amendment of the indictment.

United States v. Sir Kue Chin, 534 F. 2d 1032, 1036, (2nd Cir. 1976) cited at page 10 of the government's brief, is distinguishable and is not controlling. Sir received a one year sentence upon conviction of a narcotics conspiracy. Defense counsel triggered the deletion of overt act 5 of the conspiracy count, arguing that this particular overt act related to a second conspiracy charged in the same count. "Judge Conner accepted this argument and obliged the government to choose which of the two conspiracies it would pursue." Id. at 1034. By contrast, Judge Polladk in the instant case cured whatever error there was relative to duplicity in Count 1 by charging that it was drawn under 18 U.S.C. 371, which adequately covered both the old and

new law time periods of the Count 1 conspiracy. In the instant case the decision to delete the old law portion of Count 1 was a unilateral decision of government counsel which was sprung on defense counsel as a last minute surprise as a tricky maneuver. In the instant case it was not just an overt act that was omitted, as in Sir, but a full one-half of the charging part of Count 1. In Sir the deletion was accomplished merely by not reading overt Act 5 to the jury in the court's charge, Id. at 1034; whereas, in the instant case, the amendment was accomplished by actually obliterating (Xeroxing out) the old law conspiracy from the face of the indictment. In Sir the evidence heard by the jury relative to overt act 5 would have been admissible anyway, on issue of intent, which was "clearly an issue in the case," Id. at 1035, n. 2; whereas, in the instant case, the voluminous evidence heard by the jury of the old law conspiracy consisted in large part of hearsay evidence which, as noted above, became inadmissible as soon as the old law conspiracy was deleted, as hearsay declarations of are not admissible unless made co-conspirators/during, and in furtherance of, the conspiracy. Overt act 5 in Sir was mere surplusage, in the true sense of the word, as it was not necessary to allege an overt act in the first place in charging a Sec. 846 conspiracy. United States v. Bermudez, 526 F. 2d 89 (2nd Cir. 1975).

11.

TRIAL JUDGE'S CHARGE ON 18 U.S.C. 371

At page 12 of its brief the government cites United States v. Baratta, 397 F. 2d 215 (2nd Cir.), cert. denied, 393 U.S. 939 (1968) in support of the proposition that it was not "plain error" to charge the jury under 18 U.S.C. 371 instead of 21 U.S.C. 846. Sperling agrees wholeheartedly with this proposition of law. Sperling has never contended that it was

error, plain or otherwise, for Judge Pollack to charge under Sec. 371 instead of 846; to the contrary, Sperling contends that the 371 charge was eminently correct, as Judge Pollack must have thought it was when he gave it on his own motion without prior consultation with defense counsel. Baratta was charged with a narcotics conspiracy in violation of 21 U.S.C. 174 and was sentenced to serve five years. This sentence was within the statutory limits of either 18 U.S.C. 371 or 21 U.S.C. 174. Baratta did not complain of the length of his conspiracy sentence, but rather that the court's charge on Sec. 371 voided the conspiracy conviction. Thus, Baratta is readily distinguished from the instant case and avails the government nothing.

An additional reason for requiring the lower court to impose sentence pursuant to 18 U.S.C. 371 is that the jury might have known that the maximum sentence allowable under Sec. 371 was five years, and this might well have affected the verdict or resulted in a "compromise" verdict. Unlike the Controlled Substances Act of 1970, which is relatively new, Sec. 371 is an old and well publicized statute, even in lay circles, hence it is possible and even probable that at least one of the jurors was aware of the maximum five year penalty and informed the other jurors, who would have assumed, by virtue of Judge Pollack's specific charge on Sec. 371, that Sperling would be sentenced accordingly.

CONCLUSION

For the foregoing reasons the judgment appealed from should be reversed, with instruction to vacate the sentence on Count 1, or alternatively, to reduce the sentence on Count 1 to not more than five years and a $10,000.00 fine.

Herbert Sperling

HERBERT SPERLING
Appellant pro se

CERTIFICATE OF SERVICE

I certify this 17th day of September, 1976 that I have mailed a copy of the foregoing reply brief, certified mail, first class, postage prepaid, to counsel for the government, addressed as follows: United States Attorney, 1 St. Andrews Plaza, New York, N.Y., 10007, marked for attention of John S. Siffert and/or Audrey Strauss, Assistant United States Attorneys. Original and five copies of said reply brief being mailed this same date, September 17, 1976, to Clerk of United States Court of Appeals for the Second Circuit, certified mail, first class postage prepaid.

Herbert Sperling

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Subscribed and sworn to before me, and accepted for mailing as stated in the foregoing certificate of service by Herbert Sperling, Reg. No. 78271, this 17th day of September, 1976.

AUTHORIZED BY THE ACT OF JULY 7, 1955,
TO ADMINISTER OATHS (18 U.S.C. 4004)

Parole Officer: Authorized by the Act of July 7, 1955 to Administer Oaths (18 U.S.C. 4004).

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